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September 15, 2006

VIA HAND DELIVERY

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

RE: DTE 06-40
Reply Brief of the Cape Light Compact

Dear Secretary Cottrell:

Enclosed please find an original and eight (8) copies of the Cape Light Compact's Reply Brief in the above-referenced proceeding. Also enclosed please find a Certificate of Service and Service List.

If you have any questions regarding this request, please contact me at the above-listed number.

Sincerely,

Jonathan S. Klavens

JSK/drb
Enclosures

cc: Service List (w/enc.) (via first class mail)

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Joint Petition of Boston Edison Company, Cambridge Electric Light Company, Canal Electric Company and Commonwealth Electric Company d/b/a NSTAR Electric for Approval of Merger	)))))	D.T.E. 06-40

REPLY BRIEF OF THE CAPE LIGHT COMPACT

The towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, and the counties of Barnstable and Dukes County, acting together as the Cape Light Compact (the "Compact"), hereby respectfully submit this Reply Brief in D.T.E. 06-40.[1]

I. BY CONTINUING TO IGNORE THE EFFECT OF CONGESTION COSTS, NSTAR STILL FAILS TO ESTABLISH "NO NET HARM" FROM THE PROPOSED MERGER

In its Initial Brief, NSTAR once again claims in essence that, because congestion management costs "have been highly variable and impossible to predict with certainty," Initial Brief of NSTAR at 17 ("NSTAR Initial Brief"), it can ignore congestion management costs in determining the cost impacts of consolidating transmission rates, *see id.* at 19 (noting that retail transmission costs shown in Exhibit NSTAR-CLV-5 (Revised) were adjusted to exclude congestion costs entirely). NSTAR cannot satisfy the "no net harm" standard that must be met in merger cases by electing to ignore evidence of potential harm. *See* CLC Initial Brief at 4, 9-10.

[1] All terms and abbreviations defined in the Initial Brief of the Cape Light Compact ("CLC Initial Brief") and used in this Reply Brief have the same meaning as in the CLC Initial Brief.

Curiously, NSTAR does appear to concede that it is important to determine potential harm to customers and, if there is a potential for harm, it is appropriate to mitigate that harm. In its discussion of standby rates, NSTAR notes that "[a] rate phase-in may be an appropriate measure where there are existing customers who *may* be adversely affected by a significant change in rates." NSTAR Initial Brief at 27 (emphasis added). It is particularly striking then that, in the case of transmission rates, NSTAR not only claims that it cannot estimate the likely real-world cost impacts of consolidation but also implicitly suggests that it cannot even estimate the *potential* cost impacts of consolidation. *Id.* at 17. Of course, given the significant differences in transmission rates across service territories and the fact that congestion management costs may comprise over half of total transmission costs, the strong potential for adverse impacts to Commonwealth customers is quite clear. *See* CLC Brief at 7-10. Accordingly, the Department should either reject the consolidation of transmission rates or condition any consolidation on the implementation of measures to mitigate harm to Commonwealth customers.

II. NSTAR'S ATTEMPT TO "CONFIRM AND RATIFY" THE SUBSTANCE OF EXISTING FRANCHISE RIGHTS SHOULD BE REJECTED

NSTAR has asked the Department "to confirm and to ratify that all of the franchise rights and obligations currently held by Cambridge and Commonwealth continue with Boston Edison and thereafter with NSTAR Electric upon the consummation of the merger." NSTAR Initial Brief at 6. Then, without citing anything other than various provisions of the General Laws, NSTAR goes on to characterize at some length what it believes those "rights and obligations" are. While it is appropriate for the Department to acknowledge that, by operation of law, Boston

Edison, as the surviving entity in the proposed merger, would succeed to all rights and obligations held at the time of merger by Cambridge and Commonwealth, there is no legal need for the Department to "confirm and ratify" what those franchise rights are nor would the record in this proceeding support such a ruling.

The surviving entity in a corporate merger acquires by operation of law – and not by transfer – all rights and obligations of the non-surviving merged entity. *Cf.* G.L. c. 156B, § 80. Accordingly, G.L. c. 164, § 21, which requires legislative approval for the "transfer" by a distribution company of its franchise, simply does not apply in the case of a corporate merger. The Department decisions cited by NSTAR on page 6 of its Initial Brief merely recognize that basic legal principle; those decisions do not indicate, as NSTAR seems to suggest, that it is necessary or appropriate for the Department to "confirm and ratify" what franchise rights are acquired by merger. *See Eastern Enterprises and Colonial Gas Co.*, D.T.E. 98-128, at 104 (1999) (merely confirming that surviving entity in merger will acquire franchise rights and obligations "currently held" by non-surviving entity); *Eastern Enterprises and Essex County Gas Co.*, D.T.E. 98-27, at 75 (1998) (same; indicating that G.L. c. 164, § 21 is not implicated in a merger, which involves no sales of assets and "no transfer of any franchise rights") (citing *Haverhill Gas Co.*, D.P.I. 1301, at 4-5 (1984)).

Indeed, it would be particularly inappropriate in this case for the Department to confirm and ratify the franchise rights Boston Edison would acquire by operation of law as a result of the proposed merger. NSTAR has conceded that it has not asked the Department to investigate or verify the current validity of any of NSTAR's franchise rights. Tr. 383. Furthermore, NSTAR has not produced – and might not

even be able to produce – all the documents by which its predecessors acquired these franchise rights. Tr. 385. The Department should reject NSTAR's attempt (at pages 6-7 of its Initial Brief) to delineate what franchise rights Cambridge and Commonwealth have acquired over the years by reference to various General Laws. Absent a full investigation and without substantial evidence, the Department cannot and should not make any determination regarding what are "the franchise rights and obligations currently held by Cambridge and Commonwealth." NSTAR Initial Brief at 6. Making such a determination poses the risk that the Department might, for example, unintentionally "confirm and ratify" certain franchise rights that do not exist, have expired, are tied to compliance with certain conditions or simply cannot be adequately documented.

As the surviving entity in the proposed merger, Boston Edison (to be renamed NSTAR Electric) would acquire by operation of law whatever rights and obligations – including whatever franchise rights and obligations – Cambridge and Commonwealth held immediately prior to the merger. What those franchise rights and obligations are is a matter that need not, cannot and should not be determined in any manner in this proceeding.

III. ANY APPROVAL OF THE MERGER SHOULD BE CONDITIONED ON APPROPRIATE CREDITS TO COMMONWEALTH CUSTOMERS

In its Initial Brief, The Energy Consortium ("TEC") urges the Department to make clear that any approval of the proposed merger should require that NSTAR follow through on the commitment by Cambridge and Commonwealth to provide certain credits to their customers through the 2006 reconciliation filing. TEC Initial Brief at 19. The Compact wholeheartedly agrees and hereby makes the same request.

In addition, the Compact encourages the Department to consider carefully the impact of the proposed merger on other credits that may be due to Commonwealth customers, such as credits that may be due to Commonwealth customers upon the sale of property acquired by Commonwealth. Where the ratepayers of a particular distribution company have funded the acquisition, development and maintenance of such property, any significant gain from the sale of that property should be credited to ratepayers within that company's historic service territory. (Presumably, due to the fact that transition charges are not being consolidated at this time, allocation according to historic service territory will remain the norm with respect to the distribution of gains from the sale of historic generation assets.) Accordingly, any approval of the proposed merger should be conditioned on a commitment by NSTAR to allocate gains from property sales according to such principles.[2]

IV. ANY APPROVAL SHOULD BE CONDITIONED ON MAKING THE ENERGY EFFICIENCY PROGRAM OPERATING AGREEMENT COTERMINOUS WITH THE STATE'S ENERGY EFFICIENCY FUNDING MECHANISM

In its Initial Brief, the Compact noted that the primary data needed by the Compact are the data that NSTAR is obligated to collect and report to the Compact pursuant to that certain Energy Efficiency Plan Operating Agreement For 2003 Thru 2007, dated October 1, 2003, between Commonwealth and the Compact (the "EEP Operating Agreement") (a copy of which was attached as Attachment B to the Compact's Initial Brief). The Compact also noted that NSTAR has committed to

[2] These are not theoretical issues. We note, for example, that NSTAR's June 13, 2006 Supplemental Filing in D.T.E. 05-89 reports the sale of Commonwealth's Canon Street Facility (a former generation asset) and the proposed allocation to Commonwealth customers of the gain from the sale. We also note, for example, that Commonwealth currently holds valuable but unused or underutilized property in Wareham (the former site of Commonwealth Energy's main office) and Barnstable (a site formerly used as a sub-district office) that will presumably be sold in the foreseeable future. The Department should either confirm that such properties will be considered generation assets, so that gains from their sale will flow back to Commonwealth customers, or order that, regardless of the classification of the assets, the gains from such sales will flow back to Commonwealth customers.

honor its obligations under the EEP Operating Agreement following the proposed Merger. CLC Initial Brief at 15 (citing NSTAR Response to CLC-1-26). Because the EEP Operating Agreement is scheduled to terminate on December 31, 2007, however, the Compact requested that the Department condition any approval of the Merger on NSTAR's extension of the agreement through at least December 31, 2010. *Id.*

The Compact wishes to correct and clarify this request. Section 1 of the EEP Operating Agreement provides that the agreement "shall continue on effect until December 31, 2007, or until such time as the Agreement is otherwise terminated pursuant to Section 4(O) herein." Section 4(O) provides that the agreement "shall terminate on December 31, 2007, or upon the date the Department ceases to approve the Compact's administration of an EEP." The Compact's energy efficiency program has been a noted success, the Department has approved (in D.T.E. 00-47-C, D.T.E. 03-39, and D.T.E. 05-34) all three phases of the Compact's Energy Efficiency Plan and the Compact intends to continue seeking periodic Department approval as necessary to maintain an energy efficiency program for as long as the state's energy efficiency systems benefit charge mechanism remains in place (the funding mechanism is currently authorized through December 31, 2012), *see* St. 2005, c. 140, §§ 3 to 5. **Accordingly, the Compact respectfully requests that the Department condition any approval of the proposed merger on NSTAR's extension of the agreement through at least the earlier of (i) December 31, 2012, (ii) the termination of the state's energy efficiency systems benefit charge mechanism and (iii) the date the Department ceases to approve the Compact's administration of an Energy Efficiency Plan.**

CONCLUSION

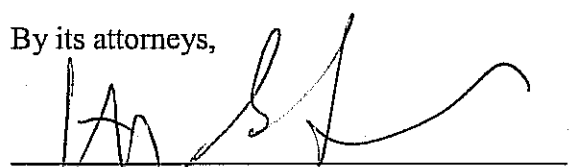
Even following its lengthy initial brief, NSTAR has failed to provide detailed, sound and credible evidence regarding the impacts of the proposed Merger and has therefore failed to meet its burden of proof under G.L. c. 164, § 96 and relevant Department precedent.

In the event that the Department nonetheless decides to approve the Merger, the Compact respectfully requests that any approval contain the conditions proposed on pages 16 to 17 of its Initial Brief, as modified (in the case of the extension of the EEP Operating Agreement) or supplemented in this Reply Brief.

Respectfully submitted,

THE CAPE LIGHT COMPACT

By its attorneys,



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Dated: September 15, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person on the service list compiled by the Secretary in this matter. Dated at Boston this 15th day of September, 2006.

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